No. 76-1528

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN AIRLINES, INC., ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals entered no opinion. The orders of the Civil Aeronautics Board (Pet. App. 10a-75a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1976 (Pet. App. 6a-7a). A petition for rehearing and suggestion for rehearing *en banc* were denied on February 3, 1977 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on May 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 1006(f) of the Federal Aviation Act of 1958, 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether Civil Aeronautics Board orders suspending airline fare increases pending investigation are reviewable.

2. Whether a proceeding in the court of appeals for review of Civil Aeronautics Board suspension orders became moot when the airlines involved withdrew the proposed tariffs.

STATUTE INVOLVED

Pertinent portions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth at Pet. App. 1a-3a.

STATEMENT

In 1974, the Board issued its final decision in the *Domestic Passenger-Fare Investigation* (*DPFI*),[1] a multiphase inquiry into the passenger fares charged for scheduled service within the 48 contiguous states. The Board found that existing domestic fare levels were unlawful and prescribed new fares as required by Section 1002(d) of the Federal Aviation Act, 49 U.S.C. 1482(d).

The *DPFI* decision also set forth guidelines to assist the Board in evaluating future tariff proposals.[2] The Board

[1] The investigation is reported in an unnumbered separately bound volume of the CAB Reports published in 1976 (hereinafter cited as *DPFI Rep.*).

[2] Under the announced guidelines, the Board found that the fair and reasonable rate of return on investment for United States carriers operating domestic scheduled service is approximately 12 percent of the total allocated cost of the passenger portion of the carriers' aircraft fleet. In computing return on investment, carrier operating data and reported earnings are adjusted to reflect the policies established in the *DPFI* to insure that the costs of uneconomic operations are borne by the carrier and not the passenger. Thus, for example, the *DPFI* guidelines disallow costs associated with excess, unused capacity and require revenue adjustments to reflect the effect that discount fares have in reducing the revenues produced by normal full fares. *DPFI Rep.* 226-520.

emphasized, however, that the guidelines were not intended to constitute a prescribed fare formula. It specifically framed the order to "leave the carriers free to file tariffs in the future proposing changes in the fare level * * * subject only to our power to suspend and investigate those tariffs." *DPFI Rep.* 766. The Board did so in recognition of "the need for flexibility in responding to changes in carrier costs and operations" (*ibid.*).

Under Section 1002(g) of the Federal Aviation Act, 49 U.S.C. 1482(g), the Board may suspend a proposed tariff up to six months, pending hearing and determination of its lawfulness. In June and September of 1975, the Board suspended tariffs filed by several air carriers proposing rate increases in domestic passenger fares, and ordered an investigation into their reasonableness (Pet. App. 10a-62a, 63a-75a). In both instances, the Board ordered the investigation and suspension after concluding that the proposed increases "may be unjust, unreasonable * * * or otherwise unlawful" (Pet. App. 25a, 64a-65a).

In determining whether to suspend the tariff proposals, the Board took account of the guidelines developed in the *DPFI*, but adjusted them to meet current conditions. Because it found that the proposed increases appeared to produce an excessive return on investment for the industry, it ordered that the increases be suspended and investigated. The carriers objected that certain adjustments in the Board's tentative analysis departed from the *DPFI* guidelines, but the Board found that the challenged adjustments were "entirely compatible with the fundamental objectives which the ratemaking standards developed in the *DPFI* are intended to promote" (Pet. App. 59a). The Board stressed that it had been making refinements continuously since the implementation of the *DPFI* four years earlier, and that such adjustments were intended to "implement more accurately" the ratemaking approach established in the *DPFI* (Pet. App. 48a).

Within a few days after the suspensions, each carrier proponent of the fare increases withdrew and cancelled its suspended tariffs. The Chief of the Board's Tariffs Section, acting pursuant to delegated authority, then dismissed the investigations. None of the carriers sought Board review of this staff action, although they could have done so. 14 C.F.R. 385.50. Moreover, approximately five months after the second suspension order, the Board permitted new tariffs to go into effect which were above the fare levels proposed in the suspended tariffs. CAB Order No. 76-2-120, decided February 27, 1976.

The carriers nevertheless filed petitions to review the suspension orders. The court of appeals dismissed after full briefing and oral argument. It held that the orders in question are not reviewable under *Moss* v. *Civil Aeronautics Board*, 430 F. 2d 891 (C.A. D.C.), and that the case is moot (Pet. App. 6a-7a).

ARGUMENT

The Civil Aeronautics Board's suspension power under Section 1002(g) of the Federal Aviation Act is substantially the same as the suspension power of the Interstate Commerce Commission under Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7). It is well settled that the Commission's exercise of its suspension power is unreviewable (*Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658; *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669), and this principle applies with equal force to the Board (*Moss* v. *Civil Aeronautics Board*, 430 F. 2d 891 (C.A. D.C.)). *Moss* created no exception to this rule. It held only on its special facts that *ex parte* conversations between Board members and airline officials had resulted in a comprehensive Board order which effectively prescribed an "agency-made" rate even

though it was cast in the form of a suspension order; it was therefore held to be reviewable as a final order. The court below, however, which included the author of the *Moss* opinion, found that the present record "does not come within the principle announced in *Moss*" (Pet. App. 7a). The District of Columbia Circuit's *per curiam* order concerning the applicability of its own precedent to the facts of this record poses no question warranting review in this Court.

The court below correctly recognized that this record is unlike *Moss*. The order here was preceded by no *ex parte* communications or announcement of "a complete and innovative scheme for setting all passenger rates" (*SCRAP*, *supra*, 412 U.S. at 693 n. 17, distinguishing *Moss*). Rather, in the exercise of its discretionary responsibility under Section 1002(g), the Board simply accompanied its suspension orders with an explanation of certain changes in the guidelines which were "rooted directly" in the previous *DPFI* proceeding.

The findings accompanying the suspension orders were tentative determinations pending the full investigation of the carriers' proposals. Indeed, the order stated that the institution of the investigation "should not be construed as any prejudgment or commitment to change" the *DPFI* principles (Pet. App. 25a). As this Court explained in *Arrow Transportation Co.*, *supra*, the brevity and informality of the suspension process provides findings which cannot be viewed as conclusive (372 U.S. at 672). On this record, these interlocutory findings—responding to the statutory requirement of stating "reasons" for suspension (Section 1002(g))—simply did not prescribe rates.

The suspension power provides "a 'means * * * for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory,

safeguarding the community against irreparable losses * * *.' " *United States* v. *Chesapeake & Ohio Railway Co.*, 426 U.S. 500, 513. This protection would be significantly reduced if the standards to be applied in the evaluation of rate increases could not be applied when a rate is suspended. Suspension is predicated on the tentative view that the proposed fares *might* be found unlawful after a full evidentiary hearing. Congress struck a balance between the interests of air carriers and their passengers by providing for suspension of rates for no more than six months in the Board's discretion. Only when a final determination is made, either sustaining or rejecting the rate change, is judicial review available. Cf. *Arrow Transportation Co.* v. *Southern Railway Co., supra.*

There is no conflict with *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 518 F. 2d 256 (C.A. 7). *United* involved tariffs rejected by the Board because they were inconsistent with rates previously prescribed by the Board in an unmodified rate order, not the suspension power (Section 403(b) of the Act, 49 U.S.C. 1373(b)).[3]

When petitioners voluntarily withdrew the suspended tariffs, they mooted the case. But for this action, the investigation would have gone forward to a final determination as to the proper application of *DPFI* standards. If the tariffs were then disapproved, the carriers could have

[3]Petitioners also err in relying upon *United States* v. *Chesapeake & Ohio Railway Co., supra* (Pet. 10-11). There the Interstate Commerce Commission ordered that a suspension be lifted on condition that the railroads use the proceeds of the proposed fare increase for capital improvements. This Court sustained the Commission's authority to impose the condition. Petitioners here are not challenging any condition to the Board's suspension, but rather its basic determination to suspend.

sought review of the Board's final order. Instead, by eliminating the tariffs which were the subject of the proceeding, petitioners also eliminated any case or controversy over whether the order suspending those tariffs was valid. *DeFunis* v. *Odegaard*, 416 U.S. 312.

This case does not fall within the scope of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, which saves from mootness repetitive orders whose short duration would otherwise prevent review. The suspension orders here were not repetitive. To the extent petitioners argue that they were required to withdraw the suspended tariffs in order to file new ones, the Board's regulations provided them with a procedure for preserving their contentions. Carriers may apply to the Board for special permission to file tariffs containing smaller fare increases than in the suspended tariffs, while the latter remain on file subject to the pending investigation. 14 C.F.R. 221.120(d). Of the four carriers which sought review below, only petitioner Trans World Airlines (TWA) requested such permission; when it was denied at the staff level, TWA did not exercise its right to seek Board review. 14 C.F.R. 385.50.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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